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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 95

MILK TRANSPORT, INC., *Appellant,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees,*

and

ALTERMAN TRANSPORT LINES, INC. AND REFRIGERATED TRANSPORT CO., INC., *Intervenors.*

On Appeal From the United States District Court for the District of Minnesota, Third Division

MOTION TO AFFIRM

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July 14, 1961

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No. 973

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Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, Intervenors Alterman Transport Lines, Inc. and Refrigerated Transport Co., Inc., move that the judgment of the District Court be affirmed.

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I. STATEMENT

This is a direct appeal from the judgment of a three-judge district court (December 21, 1960, 190 F. Supp. 350) sustaining the orders of the Interstate Commerce Commission in *Milk Transport, Inc., Grandfather Application*, MC 113255 Sub 9, and *Milk Transport, Inc., Interim Application*, MC 113255 Sub 8, in which the Interstate Commerce Commission, denying appellant's claim to grandfather and interim authority, held that the transportation of citrus juice in bulk, in tank vehicles, was not exempt from regulation prior to the effective date of the Transportation Act of 1958. The Interstate Commerce Commission held that citrus juices were not included in the term "agricultural (including horticultural) commodities (not including manufactured products thereof)" as used in Section 203 (b)(6) of the Interstate Commerce Act prior to the Transportation Act of 1958. Accordingly the appellant did not have a claim to grandfather rights under which it could file a grandfather application and enjoy the rights of a grandfather operator to continue in operation and to subsequently receive a certificate of public convenience and necessity conforming to such an operation.

II. QUESTIONS PRESENTED BY APPEAL

Appellant contends that there are two questions presented and this motion to affirm is directed toward the second, "was the transportation of citrus juices 'exempt' under Section 203 (b)(6) of the Interstate Commerce Act prior to its amendment by Section 7 (a) of the Transportation Act of 1958?" Intervenors direct their reply mainly to this specific point raised by appellant because this was their primary interest in the proceeding before the District Court.

The three-judge court held that this question is not material to the issues herein because the statute does not provide for relief for a motor carrier transporting citrus juice prior to the amendment of the Act even if the commodity were considered exempt.

III. WERE CITRUS JUICES EXEMPT FROM ECONOMIC REGULATION PRIOR TO THE PASSAGE OF SECTION 7(c) OF THE TRANSPORTATION ACT OF 1958?

Appellant endeavors to over simplify the issues in their argument that the only question to be decided is whether the commodity was exempt under the provisions of the Interstate Commerce Act prior to the 1958 amendment. Appellant argues that citrus juice is not a "processed" or a "manufactured" commodity and that the act of squeezing an orange is not an "act of manufacture." The issues in this proceeding are not as simple as appellant would imply.

Although this is the first time the question has been presented to the court, defendant-intervenors have transported the commodity for many years under certificates of public convenience and necessity issued by the Interstate Commerce Commission specifically authorizing that transportation service. We emphatically contend that the commodity is not exempt from regulation, has never been considered by the industry as being exempt, and that only appellant and one other motor carrier have contended otherwise. In MC 110190 Sub 22, Penn Dixie Lines of York, Pa., made this same argument that the juice was exempt but failed to press the claim before the Commission. That case was decided by the Commission along with *Wethins Motor Lines Interpretation of Certificate*, 61 M.C.C. 455. Penn Dixie withdrew its contention that the commodity was exempt.

The Interstate Commerce Commission, being an administrative agency of the Federal Government, is required by statute in the exercise of its duties to determine whether this commodity was or was not exempt from regulation. The agency's decision on this point is entitled to the highest respect of the courts. *Driscoll* v. *Edison Light and Power Co.*, 307 U.S. 104. A construction of doubtful correctness by an agency should be sustained and only where such action is manifestly wrong should the court fail to sustain the agency. *Costanzo* v. *Tillinghast*, 287 U.S. 341. If there is a possibility of more than one interpretation of the statute, that of the Commission should prevail. We contend that the District court has properly decided the question in this case.

IV. WHAT IS THE COMMODITY INVOLVED IN THIS PROCEEDING?

Though appellant relies upon testimony of a witness appearing in a more recent application case, that testimony can in no way be considered authoritative or controlling—due in part to the broad generalities which characterize the many intricate processes of manufacturing citrus juice on a commercial scale. This record is barren of any facts upon which this Court may predicate a decision that citrus juices are not manufactured products within the meaning of Section 203 (b) (6). The Commission, in the reasonable exercise of its powers, refers to the controlling case of *Watkins Motor Lines Interpretation of Certificate*, 61 M.C.C. 455, in denying appellant's Sub 8 and Sub 9 applications. Appellant Milk Transport, however, continued the transportation of this traffic without regard to the Commission's decision. We quote the *Watkins*

case to show the Commission's reasoning in dismissing appellant's applications:

> After extracting the juice from oranges, without concentration, it is irradiated under a patented process, using ultra violet rays. When taken from the pans in which it is irradiated its temperature is approximately 70 . Immediately thereafter, it is cooled to 28 or 29 , and then put into cardboard cartons similar to milk cartons.
>
> * * *
>
> So prepared, the commodity contains certain enzymes that cause chemical change. The ultra violet ray treatment serves to deactivate such enzymes and to slow down the chemical changes by killing certain bacteria, yeast, and molds that are unavoidably added to the orange juice in the extracting process. Although the irradiating process lowers the yeast count by 60 to 75 percent and lowers the enzyme activities from 40 to 75 percent, some of the bacteria are still present, and, to prevent them from multiplying or growing, it is necessary to keep the product at a temperature of 30 or lower. By means of the irradiation process and the indicated temperature control, the product remains marketable for a period of 10 or 11 days after it is shipped.
>
> * * *
>
> The juice of fresh citrus fruit is machine extracted and immediately thereafter reduced in temperature to between 30 and 26 . It is then packaged in cardboard containers, similar to milk cartons which are coated with a paraffin wax to assist in maintaining the fresh quality of the commodity. It is kept at all times, including the period of transportation, under refrigeration at the temperature above indicated in order to effect the maximum period of freshness without freezing. This commodity must be packaged, loaded, and

moved to consumers within 48 hours from the time it is extracted from the fruit at the mill. It is essential that it be maintained at a temperature sufficiently high to prevent the forming of ice crystals and sufficiently low to preserve its freshness. *Penn-Dixie contends that the commodity above described is an agricultural commodity, admittedly "processed, but not rising to the state of a 'manufactured product thereof,' and that the transportation thereof is exempt under section 203 (b) (6) of part II of the Interstate Commerce Act."* (457-458) (Emphasis supplied)

* * *

No. MC-110190 (Sub-No. 22).—The question presented by Penn-Dixie's motion is whether fresh orange juice is an agricultural commodity and, thus, exempt, or whether it is a manufactured product of an agricultural commodity, the interstate transportation of which is subject to regulation under the act. Penn-Dixie asserts that the extracting of the juice from the oranges, the cooling of the juice, and the packaging thereof in cardboard containers does not constitute a manufacturing process although, admittedly, it is "processing" of a type. In *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, we said (page 521):

The definition of the word "manufacture" adopted by the Court in *Fruit Growers, Inc.* v. *Brogdex Co., supra* (283 U.S. 1) in our opinion is appropriate for application here, and we conclude that the portion of the term "(not including manufactured products thereof)" means agricultural commodities in their natural state and those which, as a result of treating or processing, have not acquired new forms, qualities, properties, or combinations.

That the extracting of juice from an orange creates a new form cannot be gainsaid. Instead of

> a fruit we have a potable liquid. The orange enters the extractor as an agricultural commodity and emerging therefrom are skins, seeds, pulp, and, in our opinion, a manufactured product of the orange, namely, orange juice. This conclusion is sound despite the argument of petitioner, with which we agree, that packaging of a commodity is not a manufacturing process in and of itself. (459)

The Commission recognized the magnitude of the problem and gave more than due consideration to the physical characteristics of the commodity. The above-cited portion of the *Watkins* case indicates that the interpretation of the law under which the Commission based its final decision was not an unreasonable interpretation. We respectfully submit that the determination of the status of citrus juices requires that there be an exact commodity identification. The appellant has described the commodity as "juice removed from its natural environment, the orange," which is "prior to transportation, pasteurized and then cooled to first destroy bacteria and then inhibit further bacterial growth." Appellant argues that citrus juice is a basic agricultural commodity and not a manufactured product, claiming that the controlling decision in interpreting Section 203 (b)(6) is that found in *East Texas Motor Freight Line* v. *Frozen Food Express*, 351 U.S. 49. The *East Texas* decision was founded on the so-called "substantial identity" test. Citing that case the appellant asks this Court to adopt a holding that citrus juice is substantially identical to the orange in its natural state and hence enjoyed the same exemption as the unaltered natural fruit. There are different methods of preparing citrus juice for shipment, as evidenced by the *Watkins* case, *supra*, and the shipper testimony cited by appellant. Although the method-

are not so materially different as to result in a different end product, there is more involved in the processing than the mere pressing of the juice from the orange.

From the *Watkins* case it is clear that there are three major steps in processing the raw orange. First the oranges are placed in bins, washed and the juice extracted. During this process some of the oranges are rejected. Various types of machinery are used in the manufacturing process including the extractor and a refrigerator component, made up of filters and a compressor. Tied into the production line is flash-heating equipment which represents a tube nest and a boiler and automatic regulating control or machinery to apply ultraviolet light to the juice. A primary factor affecting the marketability of the juice is the degree of freshness, and thus a preservative process takes place after the extraction wherein the application of temperature extremes or ultra violet light inhibits the growth of bacteria and ever-present enzymes.

Thus there not only is a physical change in the product from a spherical fresh fruit to a highly treated fruit juice, there is also an organic change in the juice itself. The juice, once a part of the cellular structure of the orange, has been organically changed to retard its normal bacterial growth and enzymatic action. We therefore contend that there is sufficient evidence for the Court to find that in the course of commercial extraction and treatment sufficient processing has taken place to effect a merger of the various steps into a single manufacturing process and that this removes the juice from the agricultural commodity exemption. There is more than a mere "incidental or preliminary processing" as mentioned by the court in *Home Transfer & Storage Co.* v. *U. S.*, 141 F. Supp. 599. What

was once an orange is now a "potable liquid." There has been, in fact, a creation of a new product.

Juice extraction processes are more complex and detailed than the plaintiff would have the court believe. The Interstate Commerce Commission developed sufficient factual data on the specific charcteristic of this commodity and the multiplicity of process required to produce citrus juices. We feel that the Commission has issued a decision which is not arbitrary or capricious in any respect.

V. IS THE SUBSTANTIAL IDENTITY TEST THE ONLY TEST TO DETERMINE WHETHER THE COMMODITY WAS EXEMPT FROM ECONOMIC REGULATION PRIOR TO THE RECENT AMENDMENT TO THE INTERSTATE COMMERCE ACT?

Appellant takes the position that citrus juice was exempt from economic regulation prior to the recent amendment to the Act, basing this position on the so-called "substantial identity" test as set forth in the *East Texas* case, *supra*. Appellant argues that application of this test to citrus juice shows no substantial change which would remove the commodity from the agricultural exemption.

We believe that before the Court decides this issue it should consider the distinction between the facts in the *East Texas* case and those involved here. In the *East Texas* case the two commodities involved were fresh and frozen meat and fresh and frozen dressed poultry. The Commission held that neither fresh or frozen meats nor fresh or frozen dressed poultry were within the exemption of Section 203 (b)(6). The District Court sustained the Commission in its determination of these commodities and no appeal was taken on the

portion of the decision covering fresh and frozen meat. However, in the decision of this Court, 5 members to 4 members, it was held that fresh and frozen dressed poultry was exempt from economic regulation. This Court based its decision on the "substantial identity test" holding in effect that if an end product has retained its substantial identity with the beginning or raw agricultural product it is not a "manufactured" product when it has been subjected to only *incidental* and *preliminary* processing. We do not argue against the so-called substantial identity test set forth by this Court with respect to the transportation of dressed poultry, in view of the fact that it is visually identifiable with what was once a live fowl. Applying this test to citrus juice, however, we arrive at a contrary conclusion—that citrus juice is not a fruit, it is a juice.

When we examine a raw orange as it grows on the tree we see a spherical organic fruit containing juice or liquid which in itself is potable when once removed. Additionally, we are aware that anyone can drink or consume this liquid and/or the pulp thereof without any extraction process. We have often consumed the orange segments once having peeled the orange, grapefruit or tangerine. Let us take that same orange, grapefruit or tangerine and proceed to send it through extractors, temperature change machinery, destroy its bacteria content and increase the longevity of the commodity by retarding the enzymatic process and we have what was referred to in the *Watkins* case, *supra*, as a "potable liquid." It is doubted that anyone can dispute that there has now been a change in a high-moisture-content marketable solid fruit into what is now for the most part a complete liquid. The end product is a liquid and not only different from the raw

orange, grapefruit or tangerine in appearance but also differs from the home-produced juice in that the commercially extracted juice has been subjected to various treatments for preservation. Indeed, it might be said that the obstruction of enzymatic action by heat or light is a preservative process changing the original juice into a manufactured product in that it constitutes an effort to change the natural biochemical characteristics of the fruit.

In the *East Texas* case this Court was very careful to point out that the process of killing and dressing a chicken merely "made it ready for market" and did not turn it into a "manufactured" commodity. If this Court had decided otherwise then the agricultural exemption with respect to poultry would be meaningless since practically all poultry is killed and dressed before being placed in commerce. A contrary decision would have meant that only "live" poultry would be exempt. If that had been the intent of Congress the statute would have contained the term "live poultry" in like manner as "ordinary livestock." This Court has stated "at some point processing and manufacturing will merge" but draws a distinction between the two and states that "where the commodity retains a substantial identity through the processing stage" it is not "manufactured" within the meaning of the statute.

On this point the United States District Court for the Southern District of Texas, Houston Division, made some very pertinent comments in *Frozen Food Express* v. *U. S.*, 148 F. Supp. 399:

> We likewise hold non-exempt, under the evidence which deals with commercial creamery products, as "manufactured products" of agricultural commodities, the following: cottage cheese; cream

> cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a "manufactured product", it may well be that these items illustrate the point at which processing merges with manufacturing.

The District Court's reference to canned fruits and vegetables is quite informative in showing how processing and manufacturing can merge into a single process. It is difficult to argue that a "canned tomato" is not a tomato. In fact, a canned tomato is a tomato just as a "killed and dressed chicken" is still a chicken. Nevertheless, one is non-exempt and the other is exempt from regulation under the provisions of the Interstate Commerce Act. Also in *Frozen Foods, supra,* the District Court, applying the same test this Court applied, found that pasteurized milk is exempt and butter made from the milk is not exempt. Although nothing is added to the milk through the churning process there is a substantial loss of identity and therefore the product is no longer milk. Can that be said of the canned tomato? Is there not "substantial identity" between the canned tomato and the fresh tomato? The "substantial identity test" must not, therefore, be the only test. We believe that one must look at the processing involved.

In *Home Transfer, supra,* some light is shed on this question. The commodities in that case were frozen

fruits and vegetables which the court determined were exempt:

> The processing of fresh fruits for quick freezing in this case is essentially nothing but adding sugars, sirups, and as to peaches ascorbic acid, to better preserve the fruits and improve their color and taste. Nothing but slicing of the fruit affects its physical form. The processing of fresh vegetables for quick freezing is to heat them, in some instances after first splitting them to hasten heat action, sufficiently to kill the enzymes, and then to follow with the desired degree of freezing. Although this process may produce noticeable discoloration, or may divide a stalky variety into two or more parts, *nothing is done to otherwise change the form of the vegetables.* In other respects than those mentioned, these processed fruits and vegetables *remain essentially in the same shape and form as non-processed fruits and vegetables.* (Emphasis supplied)

There does not seem much difference in the "substantial identity" between the frozen vegetables and the canned tomato in our example. Therefore it must be important to consider the processing involved. In the *Home* case there was only incidental and preliminary processing to prepare the commodity for market. In the example of the canned tomato, there was a complicated canning process resulting in a hermetically sealed can of tomatoes. In the *Home* case as in the *East Texas* case, the commodities were cut and sliced but "nothing is done to otherwise change the form" of either. Thus for a processed agricultural commodity to be found to be exempt under the decisions of the courts, including this Court, the processing must be

incidental or preliminary for the purpose of preparing the commodity for market *and* (not *or*) there must be substantial identity between the original and processed commodities.

In the instant case the form of the commodity has been changed from a solid to a liquid through a complicated process which changes the original character of the commodity both physically and organically. Thus there remains no substantial identity between the commodities and the processing is more than an incidental or preliminary process for preparation for marketing. It has become a manufacturing process.

Therefore, the *shape* or *form* of an agricultural commodity (as qualified by the *Home* case) has been changed and a *new product* has emerged (*Frozen Food* case). We submit that the transformation of the citrus fruit into a citrus juice has been the result of a merging of the processing into a manufacturing process which thoroughly justifies a finding by this Court that citrus juice was not exempt prior to the effective date of the transportation Act of 1958.

VI. THE PETITION DOES NOT PRESENT A SUBSTANTIAL QUESTION OF JURISDICTION

The petition of appellant does not raise any substantial question because the Interstate Commerce Commission has decided that the vehicles transporting citrus juice are subject to economic regulation and there is no decision by either the Commission or a court that such transportation is exempt from the provisions of the Interstate Commerce Act as the result of an interpretation of Section 203 (b)(6). Appellant's petition assumes that the prior transportation of citrus juice was exempt from regulation. We

believe that there has been no showing that such transportation is or has been exempt from regulation and it would appear that the whole basis of the appellant's case rests on whether a court *might* have decided that such transportation had been exempt. Unfortunately there was no appeal from the decision in the *Watkins* case and, based on the law as it now stands, there is nothing to indicate that the transportation of citrus juice was ever exempt and nothing to indicate that this appellant is entitled to any grandfather rights on the basis of past transportation of that commodity.

VII. CONCLUSION

We therefore submit that the appeal presents no substantial question and that the judgment of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

FRANK B. HAND, JR.
Attorney for Intervening Defendants

July 14, 1961

VIII. CERTIFICATE OF SERVICE

I, Frank B. Hand, Jr., attorney for intervening defendants, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 14th day of July, 1961, I served copies of the foregoing document on the following parties, by properly addressed prepaid first class or air mail:

1. Perry R. Moore, Esq., 1000 First National Bank Building, Minneapolis, Minnesota.
2. The Solicitor General, Department of Justice, Washington 25, D. C.
3. Miles Lord, Esq., United States Attorney, Federal Courts Building, St. Paul, Minnesota.
4. Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.

FRANK B. HAND, JR.